SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1028

UNION PACIFIC RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

LILA B. THATCHER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Report of Opinions Below.

The opinions of the Supreme Court of Oregon are not yet officially reported in final form, but the original opinion (R. 35-49) appears in Volume 146, Pacific Reporter (Second Series), at page 76, and the final opinion (R. 54-55) is reported in Volume 146, Pacific Reporter (Second Series), at page 769.

Jurisdictional Statement.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is set out in the foregoing petition (pages 2 and 3).

Statement of the Case.

The pertinent facts are stated in the foregoing petition (pages 4-7).

Specification of Errors.

The Supreme Court of Oregon erred:

1. In concluding that the decisions of this Court in *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U. S. 44, and in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, control the present case (R. 42, 46).

2. In concluding that the command of Congress that in time of war "carriers shall adopt every means in their control to facilitate and expedite the military traffic" [10] is not self-executing but is conditioned upon some demand or order of the President (R. 43).

3. In concluding that the power granted to the President by Section 6 (8) of the Interstate Commerce Act is not self-executing and can be exercised only by formal executive order (R. 43).

4. In holding that Section 1361, Title 10, United States Code,[11] authorizes the President through the Secretary of War to restrict the venue of suits against carriers engaged in transporting troops, munitions or military supplies (R. 45).

Argument.

No liability arises under the Federal Employers Liability Act in the absence of negligence on the part of the carrier, its officers, agents or employes (45 U. S. Code, Sec. 51). As petitioner denied respondent's charges of negligence in

[10] United States Code, Title 49, Section 6 (8), quoted in footnote 3, page 3, of the foregoing petition.

[11] This section is quoted in footnote 4, page 4, of the foregoing petition.

the California case (R. 7-8), it was entitled to be heard upon that issue. Its opportunity to defend must be real and not merely colorable or illusory (*O. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 524-525).

It is admitted that petitioner could not properly present its defense on the factual issues in the California case without the personal presence of a considerable number of its employe witnesses identified in the record (R. 8-10), and that petitioner could not use such employes as witnesses in the California case without taking them out of active service for a week or more and thereby seriously retarding the movement of emergency war traffic (R. 13-14). Petitioner has not felt at liberty to withdraw such employes from public duty in Oregon to serve its private interests in California. Among such employes are two train crews, irreplaceable under present conditions (R. 12-13). Their absence from duty under such circumstances would necessarily suspend or retard the movement of some trains laden with essential war traffic. No one can foretell with exactness the ultimate effect of such an interruption in the movement of troops or supplies to the battlefront; but it seems safe to assume that the delay would at least disrupt time schedules carefully worked out and co-ordinated by those who plan the movement of military traffic to Pacific Coast ports of embarkation.[12]

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[12] "No matter how difficult the task, the Army Service Forces must come through. There are nights when tens of thousands of soldiers must be shifted great distances across the United States. On these same nights heavy freight trains, laden with raw materials, must speed toward industrial plants, while others, loaded with finished tanks, guns and planes, must rush to ports of embarkation." Report on "Military Transport and Supply" issued by the Office of War Information June 30, 1943, and printed in part in the appendix to this brief. The same report quotes the Quartermaster General, who directs the transportation of troops and supplies (10 U. S. Code, Sec. 72), as follows:

> "Never for one moment can we allow our efforts to slow down and let the flow of supplies slacken."

Section 6 (8) of the Interstate Commerce Act [13] provides that "carriers shall adopt every means within their control to facilitate and expedite the military traffic." The Interstate Commerce Commission, the office of Defense Transportation and the carriers have interpreted this provision as self-executing,[14] though not so regarded by the Oregon Court (R. 43-44). The general duty to expedite military traffic seems to be conditioned only on the existence of war or threatened war. Nor is there any indication that specific demand, even if necessary to impose the duty, need be embodied in any formal executive order or directive.[15] Therefore, Section 6 (8) "is not interpreted as merely authorizing issuance of specific preference orders to the carriers, but as including power also to compel them to adopt operating practices necessary in the view of the Office of Defense Transportation to assure preference and precedence to military traffic." And it has been assumed that this preference and precedence necessarily imply that the normal duties of carriers to others are correspondingly modified and subordinated.[16]

Obviously, carriers cannot move trains without employes to man them. The critical shortage of wartime man power is a matter of common knowledge and grave national con-

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[13] Statutory penalties for violation of the carrier's duties under this act are prescribed in Section 10. 49 U. S. Code, Sec. 10.

[14] Fifty-sixth Annual Report of the Interstate Commerce Commission, 1942, pages 4-5.

[15] It seems quite obvious that no general order would accomplish the intended purpose of Congress. Some war shipments must be transported on different time schedules than others if all are to move according to military plans. A blanket order to expedite all military traffic indiscriminately would result in needless congestion and confusion at terminals, docks and Government storehouses.

[16] For example, the carriers have been directed to disregard state laws limiting the length of trains or the number of cars that may be handled in one train. 7 Federal Register (September 15, 1942) 7258; Fifty-sixth Annual Report of the Interstate Commerce Commission, 1943, page 20.

cern. Its immediate effect upon petitioner's operations as early as August, 1942, is shown in the present record (R. 11-12). "The maximum utilization of man power resources" has been authoritatively declared to be a basic national policy.[17] That policy has been effectuated by directives and regulations which have the force of law. The employer's right to hire, and the worker's right to seek employment, are curtailed and controlled. The time and energy of civilian workers, as well as those in the armed forces, are regarded as essential national resources subject to governmental control in the national interest. It follows, of course, that the Government as well as the employer is concerned when an essential war worker is taken off the job.

But independently of specific legal duties, whatever they may be, the railroads of the country, as important parts of the modern military machine, have undertaken to assume their share of the extraordinary burdens of total war. They have not sought to determine with fine precision the exact limits of Federal war power nor the scope of the President's authority as commander-in-chief. (See *Hirabayashi* v. *United States*, U. S. 63 Sup. Ct. Rep. 1375, 1382.) Railroads, like others, have undertaken to perform what they have been directed to do in the common defense, and they have not stopped to obtain adjudications to define the exact point at which compulsory obedience may or may not be enforced.[18] Even if not legally bound to serve in that way, they should have the privilege of doing so. It is conceivably possible, of course, that petitioner might stop its entire railroad operations in Oregon long enough to try the California damage case and still escape prosecution for violating its public duty. But it should not be required to

[17] 8 Federal Register (June 1, 1943) page 7227.

run such a risk even if that were the only consideration involved (*Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 662-663).

We think the necessities of war have subjected respondent also to certain restraints not otherwise imposed. During the present emergency many of the normal rights of every citizen have been curtailed for the common benefit of all. Privileges enjoyed as a matter of course in time of peace have been subordinated to military necessity when the two have come in conflict. That result has not been accomplished by specific amendment of every statute which may recognize normal rights or privileges of citizens, for such a slow and cumbersome process would paralyze the war effort. Instead it has been assumed that the proper exercise of Federal war power is sufficient in itself to subordinate by implication all inconsistent rights or privileges of the individual.[18]

We see no reason for making an exception in respect to the usual privilege of a claimant to select the venue of a suit under the Federal Employers Liability Act. This privilege, which is no part of the fundamental rights of any litigant, consists merely of the right to choose one court rather than another when all are bound by the same law and equally competent to grant full relief. There is nothing particularly sacred about such a privilege. Like others enjoyed in time of peace, it may be subordinated to the common good in time of war. It is hardly conceivable that Congress intended that respondent, while forbidden to use a single pound of food beyond her rationed share, cannot be restrained from obstructing the physical movement of troops and supplies to the battle front. The alternative is

[18] Fifty-sixth Annual Report of the Interstate Commerce Commission, 1942, page 5.

to deny to petitioner not merely a permissive privilege, but a substantial right guaranteed by the Constitution.

The Supreme Court of Oregon seemingly recognized the conflict between respondent's normal privilege to sue in a distant forum and petitioner's duty to the public in time of war (R. 43). It indicated, however, that immediate relief can come only through the war powers of the President under Section 1361, United States Code, which provides:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war materials and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The Oregon court concluded that the President through the Secretary of War may restrict the venue of suits against such carriers while engaged in transporting war traffic (R. 45) and that any action of the civil courts toward granting such protection would "encroach upon the prerogative of the Commander in Chief of the military forces" (R. 46).

We think the Secretary of War as well as the carriers would be happy if this conclusion were correct. The present record shows ample provocation for such an order if the Secretary has the power to make it (R. 4, 20). But his failure to act, as did the Director General of Railroads in meeting a similar situation during 1918 (R. 26), suggests that he may not share the views of the Oregon Court as to the scope of his power. Except for the short period from December 27, 1943, to January 18, 1944, the carriers have not been under Federal control at any time during the present war.[19] In the absence of such control,

the relief suggested by the Oregon Court seems to be unavailable.

But the extraordinary wartime obligations imposed on carriers by statute are not conditioned upon the ability of the Secretary of War to regulate venue in civil suits against them. His commands are directed to the carriers, not to those who would sue the carriers. Control of suitors is vested in the courts. The proper exercise of such control requires no encroachment on executive prerogatives. Courts as well as other departments of government have some responsibilities arising from the necessities of total war. We see no reason why they should not lend their aid, within their proper jurisdictions, in the common fight for survival.

We find nothing in the *Kepner* and *Miles* cases which forecloses the courts from granting such relief in the circumstances here shown. The *Kepner* case held that the carrier was not entitled to injunctive relief where the inequity alleged was based only on cost, inconvenience or harassment (314 U. S. 53-54). The *Miles* case held that such relief would not be granted merely because of "the normal expense and inconvenience of trial in permitted places" (315 U. S. 705). In each case this Court considered only the carrier's charges of inconvenience, expense and annoyance *to itself*. The public interest was not involved except indirectly and remotely. This Court did not suggest in either case that a claimant is at liberty to use the venue privileges of the Federal act in such a way as to directly obstruct or retard the physical operation of interstate trains even in time of peace.

The substance of the majority opinions in both cases, as we read them, is that Congress expected that the wide

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[19] Fifty-sixth Annual Report of the Interstate Commerce Commission, 1942, pages 2, 3.

choice of venue given to claimants under the Federal act would necessarily subject carriers to "the normal inconvenience and expense of trial in permitted places" and that the courts should not relieve carriers from burdens which Congress had intentionally imposed upon them. But this Court did not suggest that Congress intended that these venue privileges should be used to defeat the Congressional purpose in other and more important matters or to deny to carriers the substance of their constitutional right to be heard. We think it important that such questions be settled by this Court before the present situation grows worse.

Respectfully submitted,

ROY F. SHIELDS,
ROBERT F. MAGUIRE,
Counsel for Petitioner;
THOMAS W. BOCKES,
Of Counsel for Petitioner.